GRAYCARY

1625 Massachusetts Avenue NW, Suite 300
Washington, DC 20036-2247
www.graycary.com
O] 202-238-7749
F] 202-238-7701

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VIA ELECTRONIC MAIL AND FED EX

Dockets Management Branch, HFA-305
Food and Drug Administration
Department of Health and Human Services
5630 Fishers Lane, Room 1061
Rockville, MD 20852

CITIZEN PETITION

On behalf of our client, Andrx Pharmaceuticals, Inc. ("Andrx"), the undersigned submits this petition under sections 301, 502, 505, and 701 of the Federal Food, Drug, and Cosmetic Act ("FDCA" or "the Act") and 21 C.F.R. §10.30 to request the Commissioner of Food and Drugs re-evaluate FDA's policy concerning the marketing of "authorized generic" versions of brand name prescription drugs.

Andrx is a developer, manufacturer, and marketer of both brand and generic pharmaceutical products and is directly adversely affected by FDA's current policy with respect to authorized generics. In particular, Andrx intends to begin marketing generic methylphenidate hydrochloride extended release tablets upon approval of its pending abbreviated new drug application ("ANDA"). The reference listed drug for Andrx's ANDA is McNeil Specialty and Consumer Pharmaceuticals' ("McNeil's") Concerta® (NDA 21-121). We understand from

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public statements that McNeil intends to market an authorized generic version of Concerta®, possibly to be sold by its affiliate Patriot Pharmaceuticals, Inc. ("Patriot"). Privately, we have been advised that McNeil intends to market an authorized generic version of Concerta® through an unrelated entity, either alone or in conjunction with Patriot, and that these authorized generics are to be introduced at or near the same time as a true generic product is launched. Thus, McNeil could be contemplating the marketing of two or even more versions of its product, one as a brand, and the others under a non-proprietary or generic name.

The Petitioner acknowledges that FDA has previously declined to take action with respect to authorized generics, based primarily on the Agency's conclusion that it lacks authority to do so in the absence of any foreseeable detriment to the safety or efficacy of the brand name drug or identifiable statutory violation. Petitioner nevertheless believes that the labeling and marketing of name brand drugs as generic versions is fundamentally misleading and therefore subject to FDA's authority to prevent misbranding under section 502(a) of the Act. In part, this belief stems from the fact that many practitioners, dispensers, insurers, and consumers are misled into prescribing, purchasing/co-purchasing, or using brand name products when the identical product is commercially available as an "authorized generic" at an often significantly lower price. Those who purchase the name brand product, of course, would seek to obtain an identical product at a lower price, if they knew it was available under a different name. Likewise, those who purchase an authorized generic no doubt believe that they are getting a product manufactured by a company other than the brand manufacturer, or with slightly different inactive ingredients than the brand, but both beliefs would be mistaken. Petitioner further believes that FDA has failed to adequately take into consideration the potential short-and long-term effects on

competition associated with the use of authorized generics to undermine the availability of true generic versions of brand name drugs. Because FDA has acknowledged that it lacks expertise in matters of competition, this Petitioner requests that FDA seek input from two federal agencies that possess such expertise: the Federal Trade Commission, and the Antitrust Division of the Department of Justice, as well as seeking general public comment on this matter.

A. Action Requested

This Petitioner requests that the Commissioner of Food and Drugs take the following actions:

1. Seek public comment, including formal written input from the Federal Trade Commission's Bureaus of Competition and Consumer Protection, and the Department of Justice's Antitrust Division, on the potential short- and long-term effects of the marketing of authorized generics on consumers, generic drug producers, and competition.

2. During the requested period of comment and consultation, the Petitioner hereby requests the Commissioner of Food and Drugs to inform McNeil Specialty Pharmaceuticals that any authorized version of Concerta® that is introduced and marketed as a "generic" drug before or during the initial product launch of the first ANDA-approved version will be regarded as misbranded and subject to regulatory action, for the reasons discussed below.

B. Statement of Grounds

1. Authorized Generics and Current FDA Policy

The term "authorized generics" as used by FDA and industry generally refers to the practice of marketing of a product approved under a new drug application ("NDA") by the NDA holder or a subsidiary or licensee of the NDA holder under the NDA, but at a lower price and not under the "brand" name. FDA's current policy with respect to authorized generics was stated in the Agency's response to two Citizen Petitions, one submitted by Mylan Pharmaceuticals Inc.[1] and another submitted on behalf of Teva Pharmaceuticals, U.S.A.[2] See Letter from William K. Hubbard to Stuart A. Williams and James N. Czaban re Docket Nos. 2004P-0075/CP1 and 2004P-0261/CP1, referred to herein as the "Petition Denial."[3] The Petition Denial and the records of both referenced Citizen Petitions are incorporated by reference herein.

As explained in the Mylan and Teva petitions, the opportunity to market the first approved generic version of an established name-brand drug operates as a major economic incentive for a company to develop a new generic drug product. This incentive is perhaps most obvious and pronounced when the first-approved ANDA holder is eligible for a 180-day period

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[1] 2004P-0075/CP1 ("Mylan Petition").

[2] 2004P-0261/CP1 ("Teva Petition").

[3] As discussed more fully below in section 3, FDA's denial of the Mylan Petition is the subject of pending litigation alleging, among other counts, that the decision is arbitrary and capricious agency action under the Administrative Procedure Act, 5 U.S.C. § 706(2)(a) and in violation of the FDCA.

of marketing exclusivity under the Hatch-Waxman amendments to the Act because it was first to challenge one or more relevant patents on the name brand drug.[4] However, even when there are no relevant patents and thus no prospect of statutory marketing exclusivity, the pricing and other advantages of reaching the market first operate as a powerful incentive.[5] Likewise, as FDA acknowledged in its Petition Denial, the economic benefits of first market entry can be expected to be substantially reduced – and routinely are reduced - by NDA-holders' widespread practice of introducing authorized generic products at, or immediately before, the initial marketing of the first ANDA-approved generic. With multiple authorized generics, those economic benefits might be eliminated in their entirety.

Nevertheless, FDA has declined to take action against the marketing of authorized generics, based primarily on its conclusion that the practice is both longstanding and lawful under certain sections of the FDCA, and that the Agency lacks authority to regulate changes in approved products that do not potentially affect product safety or effectiveness. FDA also has stated its belief that authorized generics appear to promote rather than impede competition, apparently without first consulting with other federal agencies that have the expertise in matters of competition that FDA itself concededly lacks. This last point is more fully discussed below.

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[4] FDCA § 505(j)(5)(B)(iv).

[5] Indeed, the absence of Hatch-Waxman exclusivity as an incentive in such cases arguably makes it all the more imperative that FDA not maintain regulatory policies that effectively diminish existing market incentives.

2. Authorized Generics are Inherently Misleading to Prescribers, Pharmacists, Nurses and Consumers

FDA's analysis of its authority to regulate authorized generics as requested in the Mylan and Teva petitions was based on the assumption that it could only do so if it found that the practice involved "manufacturing changes" that could affect the product's safety and effectiveness, thereby triggering FDA's authority under section 506A of the Act. FDA concluded that the kinds of changes associated with marketing an approved drug as an authorized generic (e.g., removing the brand name and/or NDA holder's name from labeling and/or other changes in labeling, packaging, imprinting, or drug listing) are all minor and unrelated to safety or efficacy and thus well-established as lawful.

In focusing exclusively on potential safety and effectiveness concerns, FDA apparently has failed to consider the fundamental prohibitions in sections 301(a) and (b) of the Act against the misbranding of drugs and the marketing of misbranded drugs. As stated in Section 502(a) of the Act, a drug "shall be deemed misbranded . . . if its labeling is false or misleading in any particular." FDA regulations further provide that "among representations in the labeling of a drug which render such drug misbranded is a false or misleading representation with respect to another drug[.]"[6] It is well established that a drug label can convey a misleading representation by implication or by omission of material information, as well as by express statements.

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[6] 21 C.F.R. § 201.6(a).

FDA has expressly recognized and affirmed the need to avoid drug labeling practices that have the potential to mislead consumers about who manufactured a drug product, citing the Agency's "strong ... belie[f] that all consumers of drug products not only desire, but need, truthful and accurate information about drug products."[7] For that reason, FDA revoked its former policy of permitting a company to be identified in labeling as the "manufacturer" of a drug that was actually manufactured by another entity with only nominal supervision by the first company's "man in the plant," and amended its drug labeling regulation accordingly.[8]

Far from declining to act in the absence of safety and efficacy concerns, FDA specifically exercised its regulatory authority under sections 502 and 701(a) of the Act to eliminate the potentially misleading practice, even though the agency also "emphasize[d] . . . that the policy [at issue] is not associated with any apparent health hazards."[9] FDA likewise flatly rejected comments that the potentially misleading practice was "primarily an economic issue and . . . that economic issues are not related to FDA's statutory mandate and, therefore, are not proper subjects for FDA regulatory action."[10] To the contrary, the Agency explained,

> FDA has the responsibility under section 502 of the act to ensure that the information that appears on drug product labels is not false or misleading. This regulation, which is intended to end a consumer deception, proceeds under paragraphs (a) and (b) of that section." . . . [T]his regulation serves consumers interest in truthful and nonmisleading information about drug products. If consumers' economic interests are also served by less deceptive label information

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[7] Final Rule, Requirements for Designating Manufacturer's Name on a Drug Product's Label (Final Rule), 45 Fed. Reg. 25,760, 25,761 (April 15, 1980).

[8] 21 C.F.R. § 201.1.

[9] Proposed Rule, Requirements for Designating the Manufacturer's Name on a Drug or Drug Product's Label, 43 Fed. Reg. 45614, 45616 (October 3, 1978).

[10] 45 Fed. Reg. 25,763.

> that does not make the subject matter of the rule an improper subject for FDA regulatory action.[11]

Finally, it should be noted that, having recognized the need to protect consumers from being misled by a previously-authorized commercial practice in that instance, FDA specifically sought input from the Antitrust Division of the Department of Justice, as well as providing for public notice on comment on potential impacts on competition.

Petitioner believes that labeling and marketing an NDA-approved drug as a "generic" product is fundamentally misleading and therefore unlawful under the FDCA. In effect, the labeling, packaging, and pricing of such a product as something other than the brand product all convey that the product is a therapeutic and pharmaceutical equivalent of a name brand product, but from a different manufacturer, different imprinting and with possibly different inactive ingredients, when in fact it is nothing other than the name brand product. As a result, those who choose the name brand product, including those who considered the authorized generic or might have done so if they had known it was identical to the branded version, are deceived into paying more for the drug. In addition, there is every reason to believe that authorized generics are widely prescribed, dispensed, and used in the mistaken belief that the name brand manufacturer does not benefit from their sale.

Neither the fact that an authorized generic is priced lower than its identical name-brand counterpart, nor the possibility that some prescribers, dispensers, or consumers would choose the authorized generic even if they were aware of these facts, makes this practice any less misleading

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[11] Id.

or the misidentification of the drugs status and origin truthful. In particular, Petitioner believes that confusion about the nature and origin of authorized generic products may affect best pricing calculations used in governmental prescription drug reimbursement programs, to establish prescription drug rebates and pricing by governmental authorities, with the result that governmental authorities are not obtaining their appropriate rebates and pricing.

Finally, the fact that section 502(b) of the Act permits a drug to be labeled with the name of a packer or distributor in lieu of the manufacturer's name - as is often the case for authorized generics - does/should not preclude FDA from concluding that a particular label is nevertheless misleading for the reasons discussed above. In some cases, a corporate relationship exists between the distributor of the authorized generic and the actual manufacturer/NDA holder; such a relationship is not disclosed in the labeling. This reading is consistent with the statutory language dealing with FDA's authority to refuse or to withdraw approval of an NDA based on misleading labeling. Specifically, section 505(d) of the Act directs FDA not to approve an application whose labeling "based on a fair evaluation of all the material facts . . . is false and misleading in any particular. Similarly, FDA has authority under section 505(e) to withdraw approval if it finds "on the basis of new information, evaluated together with the evidence before [FDA] when the application was approved, [that] the labeling of such drug, based on a fair evaluation of all the material facts is false or misleading in any particular and was not corrected within a reasonable time after written notice" to the applicant. Notwithstanding FDA's assertions in the Petition Denial that sections 505(d) and (e) of the Act provide no basis for

regulating authorized generics,[12] Petitioner believes that a fair evaluation of all the material facts must compel a conclusion that the labeling of such products is inherently misleading and therefore unlawful.

3. FDA Has Not Adequately Considered Potential Competitive Effects of Authorized Generics

Logically, a manufacturer sponsoring an authorized generic has an incentive to protect its pricing and sales of the branded version of the product, and, all else equal, can therefore be expected to price the authorized generic at a higher level than an independent generic manufacturer. If, however, a manufacturer's true incentive is to hamper or destroy competition, either for that particular product or for its entire product line, they might sponsor more than one authorized generic to cause the pricing of that product to become so low that that no ANDA applicant will thereafter challenge the patents on its other drug products; a result directly contrary to the principles of the Hatch-Waxman amendments to the Act.

Petitioner believes that the marketing of authorized generics raises serious competitive issues which have not been adequately addressed to date by the FDA.[13] In addition to

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[12] Petition Denial at 7.

[13] In addition to the pricing and other issues discussed above and in the Mylan and Teva petitions, another issue that FDA has not addressed at all to our knowledge concerns the effects of authorized generics on active pharmaceutical ingredient ("API") availability, particularly when, as is the case with Concerta, the API is also regulated as a controlled substance by the Drug Enforcement Adminstration ("DEA"). As a result, the DEA administers a quota system for the purchase of this API and otherwise regulates its procurement, storage, handling, and disposition of the product. Though the appropriate quantity of API is always difficult for a generic manufacturer to predict, the possibility that one or more additional authorized generics may enter the market further complicates this prediction, and may cause either (1) unnecessarily high quantities of this controlled substance to be

disclaiming any statutory authority to regulate authorized generics, FDA's denial of the Mylan and Teva petitions also expressed the Agency's view that the marketing of authorized generics during 180-day exclusivity is pro-competitive and consistent with the objectives of the Hatch-Waxman Amendments, even though the practice "might reasonably be expected to diminish the economic benefit of an ANDA holder who has qualified for the exclusivity."[14] Specifically, in FDA's view, there is a net benefit to competition because the introduction of authorized generics can be anticipated to encourage lower prices for the ANDA product during the exclusivity period. [15] It also is FDA's view that the continuing willingness of subsequent ANDA applicants to risk patent infringement action even when there is no prospect of exclusivity "also supports the conclusion that the incentives created by 180-day exclusivity remain adequate."[16]

FDA's current views with respect to potential competitive effects as stated in the Petition Denial appear to have been arrived at without extensive consideration of evidence, and without consultation with other agencies having specific expertise in, and jurisdiction over, competitive issues. Furthermore, recent statements by legislative and judicial experts seriously call into question FDA's position as expressed in the Petition Denial. For example, U.S. Representative Henry Waxman, a principal author of the statutory provisions governing the approval and marketing of generic drugs, recently stated that:

> [a]t a time when not only consumers but businesses and governments are desperate for ways to bring down their prescription drug bills, we must continue

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available in the market, subject to potential diversion; or (2) non-availability or reduced availability of the ingredient to potential additional generic applicants.

[14] Petition Denial at 12.

[15] Id. at 13.

[16] Id.

> to ensure that generics are readily available and fight attempts to delay their marketing entry. . . . I don't think we should again allow the frustration of the intent of the law, which is to bring about more competition, not to allow these loopholes to continue.[17]

Likewise, in litigation brought by Mylan challenging the Petition Denial,[18] U.S. Federal District Court Chief Judge Irene Keeley expressed serious concerns about possible antitrust violations in connection with the marketing of authorized generics. In particular, Judge Keeley reportedly observed:

> If the generic, the true generic is run out of the market because they can't recoup their costs of developing the drug and filing the ANDA and possibly undergoing years of litigation, isn't is in point of fact that the ultimate winner there would be the brand and this would have the deleterious effect of driving the generics out of the market? I think your argument with regard to what's going to happen in the market place is extremely compelling. . . . It strongly suggests that there is a competing public policy, which might be the Sherman Antitrust Act, and the fact that if . . . this predatory pricing on the part of a brand has an effect of destroying competition there's another public policy that's violated. [19]

Based on Judge Keeley's observations, Mylan withdrew its lawsuit without prejudice,[20] and has recently filed an expanded complaint alleging antitrust and other competitive violations in addition to its original challenge under the Administrative Procedure Act.

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[17] S. Sutter, *Congress Needs to Review "Authorized Generics, Hatch and Waxman Agree*, 16 Health News Daily 195 (Oct. 7, 2004).

[18] *Mylan Pharmaceuticals Inc. v. Food and Drug Administration,* Civ. No. 1:04cv174 (N.D. W. Va.) (filed August 5, 2004; withdrawn without prejudice Aug. 30, 2004).

[19] [Transcript of Hearing on Preliminary Injunction, as quoted in public presentation by Balto, Esq., October 7, 2004 – to be replaced by citation from transcript .]

[20] Letter from William R. Racoczy to the Hon. Irene M. Keeley (explaining that voluntary dismissal was sought to address additional facts and legal issues raised at the preliminary injunction hearing).

FDA can only properly explore these competitive issues, acknowledged by other authorities as serious questions, by calling on the Federal Trade Commission and the Antitrust Division of the Justice Department for consultation on a subject that clearly falls within their expertise. The input of the FTC will be particularly crucial, since that agency has a special expertise in harmonizing competition policy with its law enforcement role in preventing deception of consumers.

Conclusion

The marketing of name-brand pharmaceuticals as "generics" is fundamentally misleading to medical practitioners, pharmacists, nurses and other health care professionals, and consumers contrary to sections 301 and 502 of the FDCA. The intent and clear effect of this misleading practice is to undermine the economic incentive for generic drug manufacturers to make new generic drugs available to the public, as well as reducing their financial resources for developing future generic drugs. In addition to violating the letter and spirit of the FDCA, the marketing of authorized generics also raises serious anticompetitive concerns under federal antirust laws, which FDA has not adequately addressed to date. Accordingly, Petitioner urges FDA to take the actions requested in this citizen petition.

C. Environmental Impact

Petitioner believes that this petition does not require an environmental impact analysis report under 21 C.F.R. § 25.1(g)(1995).

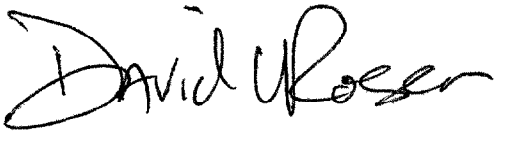
D. Economic Impact

An economic impact report is required only when requested by the Administration and such report has not been requested. 21 C.F.R. § 10.30(b).

CERTIFICATION

Petitioner certifies that, to the best of its knowledge and belief, this Petition includes all of the information and views on which the Petition relies and that it includes representative data and information known to the Petitioner, which are unfavorable to the Petition.

Respectfully submitted,



David L. Rosen, B.S. Pharm., JD

cc: Andrx Corporation
Thomas P. Rice
Scott Lodin, Esq.

Andrx Pharmaceuticals, Inc.
Lawrence Rosenthal

Food and Drug Administration
Center for Drug Evaluation and Research
Gary Buehler

Elizabeth Dickinson, Esq.
Office of General Counsel